



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 18 2014 OFFICE: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:

Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center ("the director"), denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), the petitioner states that it is a "Managing Consulting" business. The petitioner indicates that it was established in 2005 and employs eight personnel in the United States. It seeks to employ the beneficiary as a "Business Analyst" from October 1, 2013, until September 1, 2016. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the denial decision; and (5) the Form I-290B, Notice of Appeal or Motion, and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.¹

The director denied the petition, determining that although the petitioner is the entity that requested the beneficiary's classification as an alien employed in a specialty occupation, the petitioner is "not the entity that will be providing such duties to the beneficiary." The director concluded: "[t]he record, as presently constituted, is insufficient to establish that the position offered to the beneficiary qualifies as a specialty occupation and that [the petitioner has] sufficient work for the requested period of intended employment."

Upon review of the record, including the evidence submitted on appeal, the record does not include sufficient evidence demonstrating that the proffered position is a specialty occupation.

I. Facts and Procedural History

On the Form I-129, the petitioner identified the proffered position as a "Business Analyst." The required LCA indicates that the occupational classification for the position is "Management Analysts," SOC (ONET/OES) Code 13-1111, at a Level I (entry-level) wage.² The LCA was certified on March 13, 2013, for a validity period from September 1, 2013 to September 1, 2016.

The petitioner appended a "Description of Job Duties" to the petition which indicated: "the Business Analyst will be responsible for analyzing, facilitating, modeling and organizing

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

business processes in order to ensure successful implementation of IT services." The petitioner listed the following job duties of the proffered position:

- Conduct surveys, focus groups and interviews with key staff members to assess process bottlenecks and identify improvement opportunities;
- Conduct interviews and research to determine project business requirements and translate them into technical specifications for complex web-based developmental projects;
- Reconcile conflicts and distinguish solution ideas from business needs;
- Create and complete documentation through the project life cycle, including use cases, software specifications, test plans and program specifications;
- Work closely with development and business teams to create innovative and cost-effective solutions;
- Develop software specifications, business cases, process diagrams, system design, requirements traceability matrix, program specifications and test scripts;
- Lead requirements elicitation workshops through Joint Application Design (JAD) sessions;
- Analyze data and design solutions or alternative methods for business process improvement;
- Identify, implement and train users on business process changes based on new system design;
- Support software development and testing processes;
- Develop and execute functional, user and regression test in order to verify accurate function of software tools and business processes; [and]
- Prepare recommendation reports and present findings on business process changes to clients.

The petitioner also provided printouts from its website which indicated, in brief, that the petitioner: provided feasibility studies and assessments of the best products and solutions to meet a client's given need and fit within its IT strategy and vision; created a requirements analysis in order to effectively define a project scope of work; and, managed and executed business and technology projects through all phases of the system development lifecycle. The petitioner listed the challenges in each of these three areas as well as proposed solutions, and its portfolio of services to assist clients in these endeavors.

Upon review, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE.

In a response dated June 11, 2013, counsel for the petitioner noted that the petitioner is a technology consulting firm which offers technology feasibility services to state and local government agencies. Counsel referenced submitted sample contracts as examples of "the type of work executed by [the petitioner] for clients such as the [redacted] and [redacted]" Counsel emphasized that although the

petitioner provides technology services to outside clients, the beneficiary's "job duties as a Business Analyst occur in-house and under the direct control of [redacted] and Partner at [the petitioner]."³ Counsel asserted that the proffered position meets at least one of the four requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A), and in particular the requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) which requires that the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Counsel indicated that the petitioner "aims to create simplicity for government entities in the often complex world of technology" which includes analyzing "the current setbacks that the government entity is experiencing because of the lack of technology." Counsel claimed that the "Business Analyst plays a key part in diagnosing the hindrances, and then articulating how the most effective technological solutions can be implemented." Counsel asserted that this type of analysis calls for a master's degree in business administration, as well as a background in software and computer engineering. Counsel also acknowledged that "a university level (bachelor's) degree in Business Administration is the minimum qualification for the position of Business Analyst."

The record included a document with the heading "Business Analyst" and the beneficiary's name which stated:

A Business Analyst is a subject matter expert who analyzes, facilitates, models and organizes information in order to define requirements, reconcile conflicts and distinguish solution ideas from business needs. He/She creates and completes documentation through the project life cycle, including use cases, requirements, software specifications, test plans, and program specifications. And works closely with development and business teams to ensure successful implementation while creating innovative and cost-effective solutions. The primary job duties include the following:

Develop SDLC documents including software specifications, use cases, business cases, process diagrams, system design, requirements traceability matrix, program specifications and test scripts. 15%

Lead requirements elicitation workshops through JAD sessions, prototyping and present findings; communicate with a wide variety of technical and business experts in both individual and group settings. 15%

³ Counsel's indication that the beneficiary's work is under the direct control of [redacted] is at odds with the petitioner's organizational chart which shows the beneficiary reporting to [redacted] a "Business Analyst Sr" who, in turn, reports to [redacted]. Counsel corrects his reference on appeal, without explanation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Analyze data and design solutions or alternative methods for business process improvement. Detailed as-is and to-be analysis of business processes. 15%
Identify, implement, and train users on business process changes based on new system design and implementation. 5%

Decompose high-level information into details and abstract up from low-level information to resolve solution versus requirements conflicts. 20%

Support software development and testing processes and other phases of the project. 10%

Develop and execute functional, user and regression test and test plans to verify accurate function of software tools and business processes. 5%

Conduct interviews and research to determine project business requirements and translate them into technical specifications for complex web-based developmental projects. 15%

This document indicated that the highest degree completed for people in a similar position is a master's degree in business administration.

The record also included an employment offer letter to the beneficiary signed by the petitioner's president and the beneficiary on September 18, 2012. The record further included the beneficiary's employment agreement with the petitioner dated September 17, 2012, the petitioner's 2011 tax returns, the petitioner's payroll labor distribution summary, the petitioner's organizational chart, the petitioner's office lease and floor plan, and several contracts and work orders between the petitioner and other entities.

In a May 28, 2013 letter signed by the petitioner's president, the petitioner stated that the beneficiary works solely at its office located in [REDACTED]. The petitioner also provided a May 28, 2013 letter prepared by [REDACTED].

[REDACTED] repeated the job description included in the response to the RFE for the proffered position and opined: "a bachelor's degree is the minimum academic training necessary to adequately perform this job." [REDACTED] added: "a master's degree would be extremely helpful if not absolutely essential." [REDACTED] noted: "[t]he breadth of knowledge and depth of academic training and experience could only be acquired through a complete and specialized educational background such as is provided by an accredited program in management." [REDACTED] concluded: "this position is one which requires at minimum a university degree in management."⁴

⁴ Neither counsel nor the petitioner clarifies the required degree to perform the duties of the proffered position. It is unclear whether the petitioner requires a degree in business administration or management and whether the degree is at the bachelor's level or higher. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or

Upon review, the director concluded that the petitioner is in the business of locating persons with computer-related backgrounds and placing them in positions with firms that use computer-trained personnel to complete their projects. The director determined, accordingly, that the firm needing the computer-related positions would determine the job duties to be performed. The director further determined that "[t]he present record does not demonstrate the specific duties the beneficiary would perform under contract for [the petitioner's] clients" and that the record failed to establish that the position offered to the beneficiary qualifies as a specialty occupation and that the petitioner has sufficient work for the requested period of intended employment.

On appeal, counsel for the petitioner asserts that the director disregarded nearly all of the evidence submitted and erroneously concluded that the petitioner is a staffing agency. Counsel also references the opinion letter prepared by [REDACTED] and an excerpt from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* which counsel asserts confirms the proffered position is a specialty occupation. Counsel attaches documentation relevant to one of the petitioner's projects, a work order, a copy of the petitioner's employee handbook, and photographs of the petitioner's office space in addition to his brief.

II. Law and Analysis

A. The Letter Submitted for Consideration as an Expert Opinion

Preliminarily regarding counsel's observation that the director failed to acknowledge and consider the expert testimony submitted, as noted earlier, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. The AAO has reviewed the letter submitted for consideration as an expert opinion and finds that the letter does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In her letter, dated May 28, 2013, [REDACTED] (1) identifies her position at [REDACTED] (2) re-states the duties of the position as the petitioner outlined them in response to the RFE; (3) opines that "a bachelor's degree is the minimum academic training necessary to adequately perform this job;" (4) identifies particular coursework the beneficiary completed and claims this "coursework is essential for functioning effectively in this position;" and (5) concludes that the position is one which requires at a minimum a university degree in management.

First, [REDACTED]'s submission does not discuss the duties of the proffered position in any substantive detail. To the contrary, although [REDACTED] repeated the petitioner's description of duties, she provided little analysis of the duties. The degree to which [REDACTED] analyzed these duties prior to formulating her letter is not evident. Although [REDACTED] indicated that the

reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho, supra*.

beneficiary's coursework would allow him to function effectively in the position, she failed to detail why the courses were relevant and how the individual in the proffered position would be required to implement the knowledge gained in those classes to the position at hand. Moreover, a beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation.

Next the letter is not accompanied by, and does not expressly state the full content of, whatever documentation and/or oral transmissions upon which it may have been based. For instance, Ms. [REDACTED] does not indicate whether she visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties she cited would actually require. Nor does [REDACTED]'s letter articulate whatever familiarity she may have obtained regarding the particular content of the work products that the petitioner would require of the beneficiary. In short, while there is no standard formula or "bright line" rules for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than [REDACTED] has done here. Nor does Ms. [REDACTED] reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which she may have consulted in the course of whatever evaluative process she may have followed.

Furthermore, [REDACTED]'s description of the position upon which she opines does not indicate that she considered, or was even aware of, the fact that the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as noted *infra*, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. [REDACTED] nowhere discusses this aspect of the proffered position. The AAO considers this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for Ms. [REDACTED] ultimate conclusion as to the educational requirements of the position upon which she opines.

For these reasons, the letter submitted as expert testimony is not probative in establishing the proffered position as a specialty occupation.

B. Specialty Occupation

Preliminarily, we find that the director improperly concluded that the petitioner is a staffing agency and that the petitioner had not established it had sufficient work for the requested period of intended employment. The director's conclusions in this regard are withdrawn. However, the director correctly determined that the current record does not establish that the proffered position is a specialty occupation.

To meet its burden of proof on this issue, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an

occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise

interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The evidence of record in this matter presents a broad overview of the duties that the petitioner ascribes to the proffered position. Consequently, as will be evident below, the AAO finds that the evidence of record does not present the proffered position or its constituent duties in sufficient detail to establish that the substantive nature of either the position or its duties as actually performed within the context of the petitioner's business operations would be so specialized, complex, and/or unique that their actual performance would require at least a bachelor's degree in a specific specialty or its equivalent. As evident in both the petitioner's initial description of the duties and the description provided in response to the RFE, the duties are described in terms of general functions that the beneficiary would perform. As such, they do not inform the AAO of the substantive nature of the work that the beneficiary would perform, the substantive application of specialized knowledge that performance of those duties would involve, or any particular level of educational attainment in any specialty that would be required to perform them.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

Nevertheless, assuming, *arguendo*, that the generic duties as described by the petitioner would in fact be the duties to be performed by the beneficiary, the AAO will analyze them as described and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. The AAO recognizes the DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵

The petitioner identifies the duties of the proffered position as aligning most closely with that of a management analyst as described in the *Handbook's* chapter on the duties of a management analyst. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Management Analysts," <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-2> (last visited Feb. 14, 2014). We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry in the particular position.

Regarding the education and training for management analysts, the *Handbook* states:

A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA).

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include

⁵ The AAO's references to the *Handbook* are to the 2014-2015 edition, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English.

See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Management Analysts," <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last visited Feb. 14, 2014).

Initially, the petitioner failed to specify whether any degree was required to perform the work associated with the proffered position. In response to the director's RFE, counsel asserted that the type of analysis used by the individual in the proffered position called for a master's degree in business administration, as well as a background in software and computer engineering. However, neither the petitioner nor counsel stated that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. Moreover, counsel also acknowledged that "a university level (bachelor's) degree in Business Administration is the minimum qualification for the position of Business Analyst."

To satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), however, the petitioner must demonstrate that a baccalaureate or higher degree in a *specific discipline* is normally the minimum requirement for entry into the particular position. The proffered position must require a precise and specific course of study that relates directly and closely to the position in question. Here, although the *Handbook* indicates that a bachelor's degree is typically required, it also indicates that "many fields of study provide a suitable education because of the range of areas that management analysts address." See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Management Analysts," <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last visited Feb. 14, 2014). The *Handbook* notes a variety of common fields of study for a management analyst position include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English. *Id.* As noted above, counsel also confirms the minimum qualification for the position of business analyst is a bachelor's degree in business administration. However, since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

The *Handbook's* recognition that a general, non-specialty degree in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a standard, minimum entry requirement for this occupation. Thus, the *Handbook's* report does not establish that a management analyst position, the position identified by the petitioner on the LCA, requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act. Moreover, the

petitioner's claim through its counsel that a bachelor's degree in business administration is the minimum requirement to enter a business analyst position is tantamount to an admission that the position here proffered is not a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.⁶

As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or the equivalent, to satisfy this first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. In this matter, the petitioner provided the opinion of [REDACTED] to establish the proffered position is a specialty occupation. [REDACTED] also finds that the petitioner's position of business analyst may be performed by an individual who has completed a bachelor's-level degree. Although [REDACTED] indicates that "a master's degree would be extremely helpful if not absolutely essential," she does not state that a master's degree is required. Moreover, [REDACTED] provides inconsistent statements when opining: "a bachelor's degree is the minimum academic training necessary to adequately perform this job" and also opining "this position is one which requires at minimum a university degree in management." It is unclear whether [REDACTED] is identifying the minimum requirement to perform the position as a general bachelor's degree or an unspecified level of degree in management. In any event, her opinion corresponds generally to the *Handbook's* report on the educational requirements for management analyst positions which does not establish that the proffered position is a specialty occupation.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a requirement for at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both:

⁶ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

(1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102). As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner did not submit letters from its industry's professional association or letters or affidavits from other firms or individuals in the industry for consideration.

As observed above, [REDACTED] even if considered an individual in the petitioner's industry, which she is not, appeared to acknowledge that a general bachelor's degree or a "university degree in management" is sufficient to perform the duties of the proffered position. Thus, the record, including [REDACTED] opinion, does not establish that the duties of the proffered position require a degree with a precise course of study that results in a specialized discipline in order to perform them. Accordingly, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The petitioner in this matter fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of its business analyst. For example, counsel for the petitioner indicates that the business analyst is a key part of the petitioner's work processes and references [REDACTED] opinion that a person in this position must have a deep understanding of how to systematically analyze data, systems and operations. However, we observe that the implicit claim that the beneficiary must operate at an advanced level is undermined by the Level I classification of the proffered position on the LCA. A review of the beneficiary's Level I salary strongly suggests that the proffered position is actually a support role in a very complex business. If the proffered position is a higher-level position, requiring the performance of unique and specialized duties, such a position would be classified as a Level III or IV position, requiring a significantly higher prevailing wage.

The evidence of record does not establish that this position is significantly different from other management analyst positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for such positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than management analyst positions or other

closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of business analyst is so complex or unique relative to other management analyst positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the third criterion, the AAO observes that the petitioner has not provided any evidence that it has previously employed anyone to perform the duties of the proffered position. We observe that the document listing the duties of a business analyst submitted in response to the director's RFE indicated that "the highest degree completed for people in a similar position is a Master of Business Administration." However, the record does not identify any other employees that held the position, or contain evidence of their degrees, duties, and wages paid.

We note that while a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position. The petitioner's recruiting and hiring history is insufficient to establish this element.

We also observe that while a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties as described do not show that they are more specialized and complex than a business analyst position that is not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. In addition to the lack of sufficient specificity to distinguish the proffered position from other business analyst positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties, the petitioner has designated the proffered position as a Level I position on

the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at

http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Moreover, the Level I wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy. *Id.*

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Id.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker

Id.

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Id.

By virtue of the petitioner's LCA submission at the lowest possible wage-level, the petitioner effectively attested that the proffered position is a low-level, entry position relative to others

within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment."

For these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Additionally, given the *Handbook's* indication that a typical management analyst position, the position designated as most closely corresponding to the petitioner's business analyst position, does not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry into the occupation, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.⁷

The current record does not establish that the petitioner has satisfied the statutory requirement for a specialty occupation found at section 214(i)(1) of the Act and further has failed to satisfy any of the additional, supplemental requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its

⁷ It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. The LCA lists the prevailing wage in the [REDACTED] MSA as \$51,168. The petitioner also lists the wage rate on the LCA as \$65,000 annually. Either the \$51,168 or the \$65,000 wage per year would satisfy the Level I prevailing wage for a management analyst in the [REDACTED] at the time the LCA was certified. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Management Analysts," <http://flcdatacenter.com/OesQuickResults.aspx?code=13-1111&area=38900&year=13&source=1> (last visited Feb. 14, 2014). However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise his salary to at least \$66,893 per year. The Level III (experienced) prevailing wage was \$82,618 per year, and the Level IV (fully competent) prevailing wage was \$98,342 per year. *Id.*

equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

III. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.